81-5082

NO. _____

RECEIVED
JUL 17 1981
Office Of The Clerk
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1981

FRANK . PERKINS,

PETITIONER,

-vs-

ROBERT R. RAINES,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK L. PERKINS
P.O. Box B-36916
Florence, Arizona 85232

Petitioner - Propria Personam

QUESTIONS PRESENTED FOR REVIEW

1. Did the Petitioner, Mr. Perkins, suffer double punishment as a result of the sentencing court, after revoking a seven (7) year probation upon which Mr. Perkins had been sentenced to sixty (60) days in prison when the sentencing court imposed sentences of 15 to 20 years imprisonment of each of five counts of unlawful sale of narcotic, sentences to run concurrently and two 15 to 20 year sentences for unlawful transportation to run concurrently, but consecutive to the setences imposed for unlawful sale of narcotic?

2. Did the trial impose a statutorily unauthorized sentence by sentencing the Petitioner to 15 year minimums, the defendant having no prior convictions?

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1. The second sentence imposed after the trial court revoked Petitioner's seven year probation exceeded the partially served seven year probation, sixty days of which were served in prison. The law is that once sentence has been partially served, separate and different punishments are not authorized. 5th Amend., U.S.C.A. State v. Nicholos (1976) 26 Ariz.App. 455.....

2. The sentence imposed upon petitioner's seven year probation being revoked is statutorily unauthorized. The applicable sentencing statute is A.R.S. Section 36-1002.02(A). For a person not having been previously convicted, the statute authorizes a minimum sentence of five (5) years. Petitioner is currently serving a fifteen (15) year minimum, a violation of Due Process of Law, 5th Amend., U.S.C.A. Hicks v. Oklahoma ___U.S.___, 100 S.Ct. _____, 65 L.Ed. 2d 175 (1980).....

CONCLUSION.....

APPENDIX A Court of Appeals Order Denying Certificate of Probable Cause.....

APPENDIX B Court of Appeals Order Denying Petitioner's Motion for Reconsideration.....

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CASES:

State v. Nicholos, (1976) 26 Ariz.App. 455

Hicks v. Oklahoma, ____U.S.____, 100 U.S._____, 65 L.Ed.2d 175 (1980)

STATUTES:

Ariz. REv. Stat., Section 36-1002.02

OPINION BELOW

The Writ of Certiorari petitioned for herin is to review the correctness of an order of the United States Court of Appeals for the Ninth Circuit, rendered May 20, 1981, a copy of said order being attached as Appendix "A", incorporated herein by reference thereto. The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's motion for reconsideration of Appeals Court order attached as Appendix "B", incorporated herein by reference thereto, denying the Petitioner's request for a Certificate of Probable Cause was based upon citations of Pickettt v. Boykin, 118 Ariz. 261, 576 P.2d 120 (1978) and United States v. Clayton, 588 F.2d 1288 (9th Cir. 1979) affirming the United States District Court order dismissing Petitioner's 2254 Habeas claim of being incarcerated upon an illegally imposed sentence constituting double punishment.

JURISDICTION

The Jurisdiction of the Court to grant this petition and issue the writ requested is contained in 28 U.S.C.A. Section 2109.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "...no person shall...be deprived of life, liberty or property, without due process of law....
>
> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

On April 13, 1977, Pima County Superior Court Judge, the Honorable Alice Truman, entered judgements of guilt against Petitioner, Mr. Perkins, for five counts of unlawful sale of narcotics and two counts of unlawful transportation of narcotics. The court suspended imposition of sentence, and placed Petitioner of probation for a period of 7 years. The court also imposed a sentence to prison for a period of 60 days, as required by Ariz. Rev. Stat., Section 36-1002.02(F), copy excerpt attached as Appendix "C", incorporated herein by reference thereto.

Petitioner was subsequently found to be in violation of the terms of his probation. On October 13, 1978, the trial court revoked Petitioner's probation and sentenced him to 15 to 20 years on each of the five counts of unlawful sale of narcotics, with sentences to run concurrently. The court also sentenced Petitioner to 15 to 20 years on each of the two counts of unlawful transportation of narcotics, with sentences to run consecutively to the sentences imposed for unlawful sale of narcotic. Petitioner appealed from the order revoking probation and the sentence imposed. The Arizona Court of Appeals, Division Two, affirmed the order and sentences in a memorandum decision filed May 8, 1979, attached as Appendix "D", incorporated herein by reference thereto.

On January 9, 1980 Petitioner filed a petition for post-conviction relief in the trial court, alledging a violation of his 14th Amendment rights. The court dismissed the petition on April 7, 1980. On September 15, 1980, Petitioner filed a Petition for Writ of Habeas Corpus in the Arizona Supreme Court, claiming an illegally imposed sentence; said petition was denied October 7, 1980, attached as Appendix "E", incorporated herein by reference thereto.

On November 19, 1980 Petitioner filed in the United States District Court pursuant to Title 28, Section 2254 U.S.C.A., a Habeas complaint with affidavit to proceed in Forma Pauperis and motion for appointment of counsel, attached as Appendix "F", incorporated herein by reference thereto. Based upon magistrate recommendation, attached as Appendix "G", incorporated herein by reference thereto, the U.S. District Court dismissed Petitioner's Habeas application, attached as Appendix "H", incorporated herein by reference thereto. Petitioner filed petition for rehearing, attached as Appendix "I", incorporated herein by reference thereto. Petitioner's motion for rehearing was denied by the United States District Court in its order filed March 3, 1981. attached as Appendix "J", incorporated herein by reference thereto. Petitioner filed notice of appeal March 9, 1981, attached as Appendix "K", incorporated herein by reference thereto. Prior to Petitioner's filing in United States District Court an application for Certificate of Probable Cause, the United States District Court filed a refusal to issue a Certificate of Probable Cause on March 17, 1981, attached as Appendix "L", incorporated herein by reference thereto. Petitioner's subsequent application for Certificate of Probable Cause to the United States District Court dated March 16, 1981, not ruled upon by the United States District Court, attached as Appendix "M", incorporated herein by reference thereto. Petitioner subsequently filed an application for Certificate of Probable Cause in the United States Court of

Appeals for the Ninth Circuit, attached as Appendix "N", incorporated herein by reference thereto. The United States Court of Appeals for the Ninth Circuit denied Petitioner's Application for Certificate of Probable Cause May 5, 1981, attached as Appendix "A", incorporated herein by reference thereto. Petitioner subsequently filed a petition for rehearing, denied May 20, 1981, attached as Appendix "B", incorporated herein by reference thereto. Reasons for granting the writ:

1. The second sentence imposed after the trial court revoked Petitioner's seven year probation exceeded the partially served sentence of seven year probation, sixty days of which were spent in Arizona State Prison. The law is that once sentence has been partially served, separate and different punishments are not authorized. Fifth Amendment to the United States Constitution. State v. Nocholos, (1976) 26 Ariz. App. 455.

2. The setence imposed upon Petitioner's probation being revoked is statutorily unauthorized. Under the applicable Arizona sentencing statute, A.R.S. Section 36-1002.02, a person having no previous convictions, authorizeds under subsection (A) a minimum of five years. Petitioner was sentenced to and is currently serving an unauthorized mimimum of fifteen years, in violation of Due Process of Law, Amend. 5, U.S.C.A. Hicks v. Oklahoma, ___U.S.___, 100 S.Ct._____, 65 L.Ed.2d 175 (1980).

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgement of the United States Court of Appeals.

Respectfully submitted,

Frank L Perkins

FRANK L. PERKINS, Petitioner
P.O. Box B-36916
Florence, Arizona 85232

BENNY DIXON, Jail House Lawyer
prison no. 27498

SUBSCRIBED ANS SWORN TO BEFORE ME THIS 14th DAY OF JULY, 1931

Michael A. Chernetsky
NOTARY PUBLIC

My Commission Expires Jan. 27, 1985
My Commission Expires

One copy mailed to:

Clerk, United States Supreme Court

FILED
MAY 5 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY _____ DEPUTY

17

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
APR 29 1981
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

FRANK L. PERKINS,

Petitioner,

v.

ROBERT R. RAINES,

Respondent.

No. 81-8034

DC# 80-965 PHX-CLH
Arizona (Phoenix)

ORDER

Before: BROWNING and BOOCHEVER, Circuit Judges

The court has carefully reviewed the application for certificate of probable cause and concludes it does not present a substantial question. The application is therefore denied. Gardner v. Pogue, 558 F.2d 548 (9th Cir. 1977).

CR CAL 4/13/81

cc:
5th CCA
Court Reporter
Federal Defender
US Attorney
US Magistrate
Marshal
Probation
Counsel _____

S70 Fees Paid

Appendix-A

Appendix A

FILED

MAY 20 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK L. PERKINS, Petitoner, vs. ROBERT R. RAINES, Respondent.	No. 81-8034 DC# 80-965 PHX CLH Arizona (Phoenix) ORDER

Before: BROWNING and BOOCHEVER, Circuit Judges

The court, in denying a Certificate of Probable Cause, reviewed all pleadings and documents contained in the district court file, including petitioner's objections to the magistrate's report and recommendation. The court concluded that the "double punishment" argument being raised was without merit. See Pickett v. Boykin, 118 Ariz. 261, 576 P.2d 120 (1978); United States v. Clayton, 588 F.2d 1288 (9th Cir. 1979). Accordingly, the petition for rehearing, received May 13, 1981, is denied. No further motions for reconsideration will be entertained.

5/18/81

CR CAL 4/13/81

Appendix - B

Exhibit - A

ARIZONA
LEGISLATIVE SERVICE
1976

Thirty-Second Legislature

Second Regular Session

Convened January 12, 1976

Adjourned June 24, 1976

Chapters 111 to 185 [End]

TABLES AND INDEX

ST. PAUL, MINN.
WEST PUBLISHING CO.

Appendix - C

Exhibit - [redacted]

§ 36-1002.02. Import and transport of narcotic drugs; sales and traffic in narcotic drugs; penalty; probation or suspension of sentence prohibited

A. Except as otherwise provided in this article, every person who transports, imports into this state, sells, furnishes, administers or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any narcotic drug other than marijuana except upon the written prescription of a physician, osteopath, dentist, or veterinarian licensed to practice in this state shall be punished by imprisonment in the state prison from five years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison.

B. If such a person has been previously convicted once of any felony offense described in this article, or has been previously convicted once of any offense under the laws of any other state or of the United States which if committed in this state would have been punishable as a felony offense described in this article, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in a state prison from ten years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than ten years in prison.

Changes or additions in text are indicated by underline

C. If such a person has been previously convicted two or more times of any felony offense described in this article, or has been previously convicted two or more times of any offense under the laws of any other state or of the United States which if committed in this state would have been punishable as a felony offense described in this article, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned in the state prison from fifteen years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than fifteen years in prison.

D. In no case shall any person who was of the age of eighteen years or over at the time of the commission of the offense be granted probation by the trial court, nor shall the execution of the sentence imposed on such a person be suspended, nor shall the imposition of sentence be suspended if such person is convicted of a violation of the provisions of this section involving an amount of one or more drugs, other than marijuana, having a value of not less than two hundred fifty dollars, or was previously convicted of any felony offense described in this article, or has been previously convicted once of any offense under the laws of any other state or of the United States which, if committed in this state, would have been punishable as a felony offense described in this article.

E. Any person placed on probation under this section who, as a condition of probation, is required to submit to a periodic urinalysis screening and who fails such urinalysis screening shall have such probation immediately revoked upon a hearing by the court provided that such probation shall not be revoked if the failure of the urinalysis screening is due solely to the influence of medication prescribed by a physician or to participating in an approved methadone maintenance program.

F. Any person convicted of a violation of this section who is placed on probation in accordance with the terms of this section shall upon sentencing, be committed to the department of corrections for a period of not less than thirty nor more than sixty days.

Approved by the Governor, June 23, 1976.

Filed in the Office of the Secretary of State, June 25, 1976.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED
MAY 8 1979
CLERK COURT OF APPEALS
Division Two

THE STATE OF ARIZONA, Appellee, v. FRANK L. PERKINS, Appellant.	)	ORDER 2 CA-CR 1649 (PIMA County Superior Court Cause No. A-31397)

22-20C Jarrett

The Honorable Robert K. Corbin, The Attorney General, State of Arizona, Phoenix; by William J. Schafer III and Barbara A. Jarrett, Assistant Attorneys General,

Attorneys for Appellee.

Norman R. Freeman, Esq., Tucson,

Attorney for Appellant.

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its Memorandum Decision.

IT IS ORDERED that the Memorandum Decision be filed by the Clerk, and, under the Rules of Criminal Procedure, Rule 31.18, Arizona Revised Statutes, fifteen days are allowed after service of the decision to file a Motion for Rehearing.

IT IS FURTHER ORDERED that a copy of this Order, together with a copy of the Memorandum Decision, be sent to each party appearing or the attorney for such party and to The Honorable Alice Truman, Judge.

Dated: May 8, 1979.

James L. Richmond, Chief Judge.

Copies mailed as directed
this 8 day of May,
1979.

Elizabeth Urwin Fritz, Clerk.

Appendix - D

MARYANN HOPKINS-YOUNG
CLERK

Supreme Court

STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
Phoenix 85007

TELEPHONE
255-4536

October 14, 1980

Frank L. Perkins
P. O. Box B-36916
Florence, Arizona 85232

Re: FRANK L. PERKINS v. ELLIS McDOUGALL/ROBERT RAINES
Supreme Court No. H-804
Pima County No. CR-A31397

Dear Mr. Perkins:

Your Motion for Extension of Time to file a reply is moot, inasmuch as the matter was before the Court on the 7th day of October.

Very truly yours,

Maryann Hopkins-Young

Maryann Hopkins-Young, Clerk

MHY/alc
Enclosure: Copy of Order of October 7, 1980

Appendix - E

MARYANN HOPKINS-YOUNG
CLERK

Supreme Court

STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
Phoenix 85007

TELEPHONE
255-4536

October 14, 1980

Frank L. Perkins
P. O. Box B-36916
Florence, Arizona 85232

Re: FRANK L. PERKINS v. ELLIS
McDOUGALL/ROBERT RAINES
Supreme Court No. H-804
Pima County No. CR-A31397

Dear Mr. Perkins:

Your Motion for Extension of Time to file a reply is moot, inasmuch as the matter was before the Court on the 7th day of October.

Very truly yours,

Maryann Hopkins-Young

Maryann Hopkins-Young, Clerk

MHY/alc
Enclosure: Copy of Order of October 7, 1980

Appendix - E

(5)

Exhibit - E

FILED

DEC 29 1990

CLERK U.S. DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FRANK L. PERKINS

Petitioner

v.

ROBERT R. RAINES

Respondent

CIV 80-965 PHX CLH-RCG

RECOMMENDATION

* * * * * * * * * * * * * * * * * * *

TO THE HONORABLE CHARLES L. HARDY, JUDGE, UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA.

The above-entitled matter was referred to the United States Magistrate for review and recommendation pursuant to Rules 17 and 18 of the Rules of Practice, United States District Court for the District of Arizona.

Petitioner seeks habeas corpus relief. On April 30, 1977, the petitioner, having been found guilty of unlawful sale and transportation of narcotics, was placed on probation for a period of seven years and a condition of said probation provided for incarceration at the Arizona State Prison for a period of sixty days. On October 13, 1978 following a petition for revocation of probation, the petitioner was sentenced to fifteen to twenty years on the unlawful sale of narcotics and a similar sentence on the charge of unlawful transportation. The present petition alleges that this constituted double punishment and was constitutionally invalid. The State of Arizona has filed a response alleging that this particular allegation was not previously raised in state court.

The petition therefore would be premature and subject to dismissal under Carothers v. Rhay, 594 F.2d 225 (9 C.A. 1979). However, in the opinion of this Court, it would be futile to dismiss the petition on that ground inasmuch as the allegation raised is totally devoid of merit. Arizona Revised Statute 36-1002.02(C) makes a period of incarceration

Appendix C

mandatory when placing a person convicted of a narcotics offense pursuant to this statute. The Arizona Supreme Court in Pickett v. Boykin, 118 Ariz. 261, 576 P.2d 120 (1978) has held that incarceration as a part of probation is not a sentence to confinement, but is, instead, a condition of probation established at the time sentence is suspended. See also, State v. Valenzuela, 116 Ariz. 61, 567 P.2d 1190 (1977).

RECOMMENDATION: It is recommended that the petition be dismissed without a hearing.

DATED at Phoenix, Arizona, this 29th day of December, 1980.

Copy of the foregoing
mailed this 29th day of
December, 1980, to:

Frank L. Perkins
Box B 36916
Florence, AZ 85232

Barbara A. Jarrett
Assistant Attorney General
Second Floor, West Wing
1700 West Washington
Phoenix, AZ 85007

Jacqueline S. Moore
Deputy Clerk

Richard C. Gormley
RICHARD C. GORMLEY
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DATE January 12, 1981

FRANK L. PERKINS,

PLAINTIFF,

vs.

ROBERT R. RAINES

DEFENDANT.

No. CIV 80-965 PHX CLH

COPY
OF
ORIGINAL FILED ON THIS DATE
JAN 12 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

The Court having considered Petitioner's Application for Writ of Habeas Corpus, and the Magistrate's Recommendation, IT IS ORDERED approving the Magistrate's Recommendation.

IT IS FURTHER ORDERED dismissing the application.

Exhibit - [redacted]

cc: all counsel of record

CHARLES L. HARDY
United States District Judge

Appendix - H

AO 72 (Rev. 8/82)

JUDGMENT ON DECISION BY THE COURT

FILED (63)

JAN 13 1981

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY _____ DEPUTY CLERK

United States District Court

FOR THE

DISTRICT OF ARIZONA

CIVIL ACTION FILE NO. 80-965-PHX-CLH

FRANK L. PERKINS,

vs.

ROBERT R. RAINES, et al.

JUDGMENT

This action came on for ~~xxxx~~ (hearing) before the Court, Honorable Charles L. Hardy, United States District Judge, presiding, and the issues having been duly ~~xxxx~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Plaintiff take nothing and the action is hereby dismissed.

Dated at Phoenix, Arizona, this 13th day of January, 19 81.

W. J. FURSTENAU
Clerk of Court

By _____
Deputy Clerk

Appendix - H-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DATE February 26, 1981

FRANK L. PERKINS,

PLAINTIFF,

vs.

ROBERT R. RAINER,

DEFENDANT.

No. CIV80-965 PHX CLH

J

IT IS ORDERED denying petitioner's motion for rehearing.

COPY
OF
ORIGINAL FILED ON THIS DATE
MAR 3 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CHARLES L. HARDY
United States District Judge

cc: all counsel of record

Appendix - J

FILED

MAR 17 1981

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

L

FRANK L. PERKINS,

Petitioner,

vs.

ROBERT R. RAINES,

Respondent.

No. CIV 80-965 PHX CLH

REFUSAL TO ISSUE CERTIFICATE OF PROBABLE CAUSE

The petitioner has appealed from an order of this Court dismissing his petition for habeas corpus relief and denying a motion for rehearing. Where an appeal is taken in a habeas corpus proceeding Rule 22(b), Rules of Appellate Procedure, require the Judge who rendered the judgment to "either issue a certificate of probable cause or state the reasons why such a certificate should not issue."

A certificate of probable cause should not issue in this case because the appeal is frivolous.

On April 13, 1977 the petitioner was adjudged guilty by the Superior Court of Arizona of five counts of unlawful sale of narcotics and two counts of unlawful transportation of narcotics. Imposition of sentence was suspended and he was placed on probation for a period of seven years. The Court's judgment also recited:

> "IT IS FURTHER ORDERED that the defendant be committed to the Department of Corrections for a period of sixty (60) days.
>
> "In imposing sentence, the Court has considered the time the defendant spent in the Pima County Jail."

On October 13, 1978 the petitioner's probation was revoked and he was sentenced to prison for from 15 to 20 years on each of the five counts of unlawful sale of narcotics, which were to run concurrently, and for 15 to 20 years on each of the two counts of unlawful transportation of narcotics, each of which were to run concurrently with each other but consecutive to the sentences imposed for

Appendix - L

unlawful sale. The petitioner now contends that he has been subjected to double jeopardy in violation of the Fifth Amendment.

In Arizona a person who has been convicted of unlawful sale of narcotics and who is placed on probation must be committed to the Department of Corrections for not less than 30 nor more than 60 days. A.R.S. 36-1002.02C (supp.). The Arizona Supreme Court has held that incarceration as a part of probation is not a sentence to confinement but is, instead, a condition of probation established at the time sentence is suspended. Pickett v. Boykin, 118 Ariz. 261, 576 P.2d 120 (1978) cf, United States v. DiFrancesco, _____U.S._____, 101 S. Ct. 426 (1980).

IT IS ORDERED denying certificate of probable cause.

DATED this 16 day of March, 1981.

Charles L. Hardy

CHARLES L. HARDY
Judge of the United States District Court

cc: all counsel of record